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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SELWIN E. GRAY,

Defendant and Appellant.

B264413

(Los Angeles County
Super. Ct. No. BA406336)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Selwin Gray appeals from a judgment entered after a jury found him guilty of possession of an assault weapon (Pen. Code, § 30605, subd. (a))¹ and one of two counts of assault with an assault weapon on a peace officer (§ 245, subd. (d)(3)),² and also found firearm enhancement allegations to be true. The trial court sentenced Gray to 16 years in prison. Gray contends the prosecutor committed misconduct in stating the law on assault and commenting on the reasonable doubt standard. He also contends the trial court erred in declining to instruct the jury on (1) the lesser related crime of brandishing a firearm and (2) unanimity on the two assault counts. We reject his contentions and affirm.

BACKGROUND

On December 31, 2012, Officer Shaw was driving a marked patrol car with Officer Espinosa in the front passenger seat. About 9:30 p.m., the officers observed a sport utility vehicle (SUV) Gray was driving and decided to conduct a traffic stop after they heard screeching and saw smoke coming from the tires. Although the patrol car's lights and siren were activated, the SUV did not pull over, instead maintaining its speed and later driving through a stop sign.

Eventually, Gray opened the SUV's front driver side door as the SUV was slowing to a stop. Officer Espinosa opened the patrol car's front passenger door, preparing to exit. The patrol car was positioned behind Gray's SUV. Gray emerged from the SUV before the SUV came to a complete stop. He was carrying an AK-47 assault rifle. He turned, lifted the rifle, and pointed it at Officer Shaw, who was still sitting in the patrol car. Gray was about 10 to 15 feet away from the patrol car. Officer Espinosa had already exited by this point and was standing next to the patrol car, looking toward the passenger side of the SUV.

Officer Shaw exclaimed, ““Oh shit, a rifle,”” as he parked the patrol car, jumped out, and dove underneath a parked car. When Officer Espinosa heard the word “rifle,” he

¹ Further statutory references are to the Penal Code.

² The jury found Gray not guilty on the other assault count.

looked to his left and saw Gray standing on the sidewalk pointing the rifle at Espinosa. As Officer Espinosa reached for his gun, Gray lowered the rifle and “rack[ed] the action,” seemingly attempting to clear a round from the rifle’s chamber. Then, Gray ran. Officer Espinosa chased Gray. Officer Shaw came out from under the parked car and followed. Officer Espinosa observed Gray continuing to rack the action of the rifle as he ran.

Gray entered a crawlspace underneath a house and hid. Eventually, he came out and surrendered. Officer Espinosa searched the crawlspace and found an AK-47 assault rifle buried in the dirt with its safety switch off. The rifle had a live round in the chamber and 28 rounds remaining in the magazine that originally held 30 rounds. Officer Shaw searched along the route Gray ran from the SUV and located a round with a mark on it, indicating the bullet had misfired. The round was the same brand and caliber as the ammunition in the recovered rifle, but the prosecution’s forensic scientist could not determine if the round was fired from that rifle.

At trial, the jury viewed a video captured by the patrol car’s dashboard camera, showing Gray exiting the SUV and pointing the rifle at the patrol car. The camera did not capture Gray pointing the assault rifle a second time while standing on the sidewalk, as Officer Espinosa described in his trial testimony. The camera was not positioned to film in that direction.

The jury found Gray guilty of assault with an assault weapon on Officer Shaw (count 1) and not guilty of assault with an assault weapon on Officer Espinosa (count 2). The jury found personal use firearm enhancement allegations to be true on count 1. (§§ 12022.5, subd. (b) & 12022.53, subd. (b).) The jury also found Gray guilty of possession of an assault weapon (count 3).

The trial court sentenced Gray to the lower term of six years for the assault in count 1, plus a consecutive 10-year term for the firearm enhancement under section 12022.53, subdivision (b), for a total of 16 years. The court imposed and stayed the sentence on count 3.

DISCUSSION

Alleged Prosecutorial Misconduct

Gray contends the prosecutor committed misconduct in stating the law on assault and commenting on the reasonable doubt standard.

Prosecutor's statements on the law of assault

On numerous occasions during argument, the prosecutor told the jury a person commits assault with an assault weapon on a peace officer if he points a loaded assault weapon at a peace officer, regardless of whether he pulls the trigger. Gray's counsel objected to some of these arguments, asserting they were misstatements of law. The trial court overruled the objections and admonished the jury to follow the jury instructions.³ After the prosecutor's argument, Gray moved for a mistrial based on the alleged misstatements of law. The court denied the motion. On appeal, Gray contends the prosecutor committed misconduct by misstating the law on assault.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44; *People v. Cash* (2002) 28 Cal.4th 703, 733.) "Although counsel have "broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law." (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266.)

³ Notwithstanding the Attorney General's argument to the contrary, Gray preserved this issue for appeal although his counsel did not object to each and every one of the alleged misstatements of law. Further objection (and a request for admonishment) would have been futile after the trial court overruled the same objection multiple times.

“An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) “Assault requires the willful commission of an act that by its nature will probably and directly result in injury to another (i.e., a battery), and with knowledge of the facts sufficient to establish that the act by its nature will probably and directly result in such injury.” (*People v. Miceli* (2002) 104 Cal.App.4th 256, 269, citing *People v. Williams* (2001) 26 Cal.4th 779, 782 (*Williams*)). Gray argues “pointing a gun at another person does not constitute the ‘unlawful attempt . . . to commit a violent injury’ required for an assault (§ 240) because that act, without more, will not directly and probably result in the application of physical force against another.” Case law is not on Gray’s side. He cites no case specifically holding an assault requires more than pointing a loaded firearm at a person.

In *People v. Raviart* (2001) 93 Cal.App.4th 258, 263 (*Raviart*), the Court of Appeal explained, “[a]ssault with a deadly weapon can be committed by pointing a gun at another person.” Quoting our Supreme Court, the appellate court in *Raviart* noted, “‘criminal attempt “need not be the last proximate or ultimate step toward commission of the substantive crime.”’” (*Id.* at p. 266, quoting *Williams, supra*, 26 Cal.4th at p. 786.) “An assault occurs whenever “[t]he next movement would, *at least to all appearance*, complete the battery.”’” (*Williams, supra*, 26 Cal.4th at p. 786; see *People v. Miceli, supra*, 104 Cal.App.4th at p. 269 [“To point a loaded gun in a threatening manner at another (especially if accompanied by threats to shoot, as here) constitutes an assault, because one who does so has the present ability to inflict a violent injury on the other and the act by its nature will probably and directly result in such injury”].)⁴

Gray argues *Raviart* “was wrongly decided, because it proceeded on the assumption that pointing a gun at a person can constitute an assault.” *Raviart* is good law, and our Supreme Court has cited it in discussing the elements of assault with a deadly weapon and upholding assault convictions where the defendants pointed a loaded gun. (*People v. Chance* (2008) 44 Cal.4th 1164, 1175 [“The *Raviart* court’s reading of

⁴ Gray did not threaten to shoot.

Williams was correct. Our references to the last proximate step, and to the next movement completing a battery, were for the purpose of explaining that assault occurs at a point closer to the infliction of injury than is required for crimes falling under the general doctrine of criminal attempt. [Citation.] The *Williams* analysis did not disturb the numerous cases demonstrating that assault is not limited to acts done at the last instant before a completed battery”]; *People v. Hartsch* (2010) 49 Cal.4th 472, 507-508 [citing *Raviart* after explaining the defendant “concede[d] that pointing a gun at someone in a menacing manner is sufficient to establish the requisite mental state” demonstrating “he knew that his actions that night would probably and directly result in a battery”].)

Based on our reading of the case law, the prosecutor did not misstate the law and accordingly did not commit misconduct during his arguments regarding the law on assault.

Prosecutor’s statements on the reasonable doubt standard

During closing argument, Gray’s counsel discussed the various standards of proof in litigation and explained proof beyond a reasonable doubt is the “highest” standard. In rebuttal argument, the prosecutor discussed the legal meaning of proof beyond a reasonable doubt and then commented: “And in fact I know [defense counsel] talked about there’s all these different burdens, depending on the court you’re in, and all of that. Beyond a reasonable doubt is the highest standard out there. And yes, it’s high. But it’s not impossible to meet. People are convicted in this country with this standard, every day, Monday through Friday. It is not an impossible burden.” Gray’s counsel did not object to this comment. On appeal, however, Gray contends the comment constituted prosecutorial misconduct because it “trivialized the burden of proof.”

“As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) “A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished

does not forfeit the issue for appeal if ““an admonition would not have cured the harm caused by the misconduct.””” (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Gray forfeited this issue for appeal by failing to object below. Even if Gray had preserved this issue for appeal, we would reject this claim of prosecutorial misconduct.⁵

Gray’s reliance on *People v. Nguyen* (1995) 40 Cal.App.4th 28 (*Nguyen*) is misplaced. There, the prosecutor commented during closing argument: ““The standard is reasonable doubt. That is the standard in every single criminal case. And the jails and prisons are full, ladies and gentlemen. [¶] It’s a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you’re driving. If you have reasonable doubt that you’re going to get in a car accident, you don’t change lanes. [¶] So it’s a standard that you apply in your life. It’s a very high standard. And read that instruction, too. I won’t paraphrase it because it’s a very difficult instruction, but it’s not an unattainable standard. It’s the standard in every single criminal case.” (*Id.* at p. 35.)

In disapproving the prosecutor’s comments, the appellate court in *Nguyen* explained: “The prosecutor’s argument that people apply a reasonable doubt standard ‘every day’ and that it is the same standard people customarily use in deciding whether to change lanes trivializes the reasonable doubt standard. It is clear the almost reflexive decision to change lanes while driving is quite different from the reasonable doubt standard in a criminal case. The marriage example is also misleading since the decision to marry is often based on a standard far less than reasonable doubt, as reflected in statistics indicating 33 to 60 percent of all marriages end in divorce.” (*Id.* at p. 36.) The appellate court also stated: “We strongly disapprove of arguments suggesting the reasonable doubt standard is used in daily life to decide such questions as whether to

⁵ We address the merits because Gray raises an ineffective assistance of counsel claim based on his trial attorney’s failure to object to this comment. Because the prosecutor did not engage in misconduct, as we explain below, we reject Gray’s ineffective assistance of counsel claim.

change lanes or marry. The argument is improper even when the prosecutor, as here, also states the standard for reasonable doubt is ‘very high’ and tells the jury to read the instructions.” (*Ibid.*)

Here, the prosecutor did not trivialize the proof beyond a reasonable doubt standard by comparing it to standards people use in making everyday decisions. He merely made the factual assertion, “People are convicted in this country with this standard, every day, Monday through Friday.” He acknowledged the standard is “high,” but argued it is “not impossible to meet.” His comments do not constitute misconduct.

Absence of Jury Instructions

Gray contends the trial court erred in denying his request for instructions on the crime of brandishing a firearm and failing to give a unanimity instruction on the assault counts.

Brandishing a firearm

Brandishing a firearm is a lesser related offense of assault with a firearm. (*People v. Steele* (2000) 83 Cal.App.4th 212, 218.) A trial court may not “instruct on lesser related offenses, absent the stipulation of both parties, or a party’s failure to object to such an instruction.” (*Id.* at p. 217, citing *People v. Birks* (1998) 19 Cal.4th 108, 136, fn. 19.) A “defendant has no right to instructions on lesser related offenses even if he requests the instruction and it would have been supported by substantial evidence.” (*People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.)

Gray’s counsel asked the trial court to instruct on the uncharged crime of brandishing a firearm so he could argue to the jury that Gray’s conduct may have constituted brandishing a firearm but it did not constitute assault with a firearm. The prosecutor refused to stipulate to the instruction. The trial court therefore denied Gray’s request for the instruction. In closing argument, Gray’s counsel argued the evidence failed to prove assault with a firearm but may have established brandishing a firearm. Based on the prosecutor’s refusal to stipulate to the instruction, the trial court did not err in declining to instruct on brandishing a firearm.

Unanimity on the assault counts

“When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The duty to instruct on unanimity when no election has been made rests upon the court sua sponte.” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

Gray argues the trial court had a duty to instruct on unanimity because it is not clear whether the jurors found Gray guilty of the assault on Officer Shaw “for his act of attempting to fire the rifle when he was on the sidewalk” or “for pointing the rifle in the officers’ direction as he was exiting his SUV.” We disagree with Gray’s characterization of the record.

During closing argument, the prosecutor told the jury Gray committed the assault on Officer Shaw when he exited the SUV and pointed the assault rifle at Officer Shaw, and committed the assault on Officer Espinosa a few seconds later when he pointed the rifle at Officer Espinosa while standing on the sidewalk. For example, the prosecutor stated: “[Gray] gets out of that SUV with that weapon pointed at Officer Braxton Shaw. Because he’s the one . . . that’s sitting in the police car. And he points that weapon, and he’s got the video. You’ll see that. You’ll have the still pictures, for approximately one second of Braxton Shaw. [¶] He tilts forward and faces forward and he takes off running to the sidewalk. He gets to the sidewalk and he turns and takes a firing stance. Legs are apart. The weapon is up and he’s aiming at Officer Espinosa. [¶] And at that moment he pulls the trigger. Officer Espinosa is lucky to be alive. But for poor quality manufacturing from China for that weapon, and poor quality manufacturing from Eastern Europe for the type [of] cartridges that you have, this weapon would not have misfired and Officer Espinosa would be dead. You know that; right?” By these comments, the prosecutor indicated the assault on Officer Shaw was captured on the dashboard camera

video, while the assault on Officer Espinosa occurred moments later after Gray had moved out of the camera's view.

Assuming the prosecution did not make a clear election, and the trial court therefore should have instructed on unanimity, any error was harmless under either the *Chapman* or *Watson* standard.⁶ It was clear from the officers' testimony that, to the extent Gray pointed the rifle while standing on the sidewalk, he pointed it at Officer Espinosa only. Officer Shaw testified he dove under a car as soon as Gray pointed the rifle at him as Gray was exiting the SUV. Officer Espinosa testified he did not know where Officer Shaw was at the time he saw Gray standing on the sidewalk pointing the rifle at him. Based on our review of the record, we have no reason to believe the jury would have thought Gray's actions while on the sidewalk formed the basis for the assault on Officer Shaw charged in count 1.⁷

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

WE CONCUR:

ROTHSCHILD, P. J.

LUI, J.

⁶ *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.

⁷ We need not address Gray's claim of cumulative error because we have found no error to cumulate.